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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 342.

C. C. McCOLLUM, Trustee in Bankruptcy of
LOOKOUT PLANING MILLS,
Petitioner,

versus

HAMILTON NATIONAL BANK OF CHATTANOOGA.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

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C. C. McCOLLUM, Trustee in Bankruptcy of
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versus

HAMILTON NATIONAL BANK OF CHATTANOOGA.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

The petition for writ of certiorari having been granted, the question now presented is whether the Supreme Court of Tennessee erred in decreeing that the defendant bank was entitled to set off against petitioner's judgment any debt owing it by the bankrupt (R. 82).

Petitioner contends (1) that he has been denied the right to have his action to recover the penalty governed exclusively by the specific provisions of Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, and (2) if the de-

fense of set-off be available, this right is governed *ex proprio vigore* by Section 68 of the Bankruptcy Act, under which no set-off would be permissible.

We present these contentions in the order stated.

(1) Petitioner Denied the Right to the Exclusive Remedy Provided by the Federal Statute.

The Supreme Court of Tennessee held that petitioner's right and remedy were governed by the National Banking Act, Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, and that the penalty could only be recovered in an independent action of debt. However, the state court was further of opinion that "there is no provision in the Banking or Bankruptcy Act restricting or prohibiting the bank from off-setting the same (the decree for the penalty) with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute" (R. 82).

The decree of the State Supreme Court, directing that the judgment for the penalty be applied as a set-off against the indebtedness of the bankrupt to the defendant, is based upon an incorrect conception of the federal legislation creating and regulating national banks. This legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred and penalties provided are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states (**Easton v. Iowa**, 188 U. S. 220, 47 L. Ed. 452, 456).

It was said in **Farmers & Mechanics National Bank v. Dearing**, 91 U. S. 29, 23 L. Ed. 196:

"National banks organized under the act are in-

struments designed to be used to aid the Government in the administration of an important branch of public service. They are means appropriate to that end."

It is not necessary, we believe, to quote at length the provisions of the National Banking Act, but it is sufficient to say that banks organized thereunder are authorized to make contracts and to exercise all such incidental powers as may be necessary to carry on the business of banking, including the discounting and negotiating of promissory notes and drafts. Severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the National Bank Act, and section 5198 (12 U. S. C. A., Section 86) provides that if more than the legal rate of interest is charged by and paid to any association organized under the act, the person by whom it has been paid, or his legal representative, "may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid," etc.

Congress has thus provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute, and has given particular attention to the matter of interest or discounts which may be charged and taken by them, and has provided a special and severe penalty for the violation of the provisions of the act with respect to usury. It cannot be said that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation, or to retard, impede, burden or in any manner control the enforcement of the penalty provided for the taking of usury. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities (**Easton v. Iowa**, supra).

Only by disturbing the uniformity which the act is designed to secure and departing from the principle which it is intended to enforce can any state require, as a condition precedent to relief, that the debtor either show that the principal debt has been fully satisfied, or that the decree for the penalty shall be applied as a set-off thereon. No state is at liberty thus to interfere with the operation of a law of Congress (**New York Central R. Co. v. Winfield**, 244 U. S. 147, 61 L. Ed. 1045).

A leading case in which this Court had occasion to consider the limitation of legislation by a state affecting a subject within the scope of action by Congress is that of **Prigg v. Pennsylvania**, 16 Pet. 539, 10 L. Ed. 1060, from which we quote the following observations:

> "If Congress had a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

On the immediate subject of control over national banks it was said, in **Farmers & Mechanics Nat'l Bank v. Dearing**, 91 U. S. 29, 23 L. Ed. 196:

> "The states can exercise no control over them (national banks), nor in anywise affect their operation, ex-

> cept in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' • • • 'The states have no power, by taxation or otherwise, to • • • burden, or in any manner control, the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

With respect to the 30th section of the Act of 1864, carried into Section 5198 of the Revised Statutes, it was said:

> "In any view that can be taken of the 30th section the power to supplement it by State legislation is conferred neither expressly nor by implication."

In **Yates v. Jones National Bank**, 206 U. S. 179, 51 L. Ed. 1002, opinion by Mr. Justice White, the Court considered the liability of directors of a national bank for the making of false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, and held that such liability is exclusively governed by the specific provisions on the subject contained in the National Bank Act, and that a contrary conclusion would lead to a varying measure of responsibility to the several states in which the question of liability might arise, depending upon the conception of the state courts of last resort as to the meaning of the Acts of Congress imposing the duties; that the same provision of the statute might mean one thing in one state and a different thing in another. The Court said:

> "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely en-

joined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principles that where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. **Farmers & Mechanics Nat'l Bank v. Dearing**, 91 U. S. 29, 35, 23 L. Ed. 198, 199, and cases cited. The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability."

In the case of **Gilvary v. Cuyahoga Valley R. Company** (1934), 292 U. S. 57, 78 L. Ed. 1123, 54 Sup. Ct. Rep. 573, the Court said, with respect to the Safety Appliance Acts:

> "These acts operate to exclude State legislation, whether consistent, complementary, additional, or otherwise."

This Court has held, with special reference to Section 5198, Revised Statutes:

> "Where the statute creates a new offense and denounces the penalty or gives a new right and declares the penalty the punishment or the remedy can be only that which the statute prescribes."
>
> Farmers & Mechanics Nat'l Bank v. Dearing (1875), 91 U. S. 20, 23 L. Ed. 196.

> "The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case. * * *
>
> "The remedy given by the statute for a wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute

which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

"* * * The defendant has a right to insist that the prosecution shall be by a suit **brought specially and exclusively for that purpose**, where the sole issue is the guilt or innocence of the accused, without the presence of **any** extraneous facts which might confuse the case," etc. (Emphasis ours.)

Barnet v. Muncie Nat'l Bank (1878), 98 U. S. 555, 25 L. Ed. 212.

"The Supreme Court of Missouri was correct in holding that the defendants could not be allowed set-off or credit for the usurious interest thus paid, **the remedy provided by the statute being exclusive.**" (Emphasis ours.)

Haseltine v. Central Nat'l Bank (1901), 183 U. S. 132, 46 L. Ed. 118.

"The remedy afforded by Section 5198 of the Revised Statutes is exclusive and **is confined to an independent action** to recover the usury payments." (Emphasis ours.)

Schuyler National Bank v. Gadsden (1903), 191 U. S. 451, 58 L. Ed. 258, 24 Sup. Ct. Rep. 129.

That usurious interest paid to a national bank cannot be applied by way of set-off or payment on the principal is directly held by this Court in **Barnet v. Muncie Nat'l Bank** (1878), 98 U. S. 555, 25 L. Ed. 212, and other cases cited and quoted from on page 14 et seq. of our original brief. These cases consider the question in the reverse situation from that here presented, that is to say, the right of set-off is not here claimed in behalf of the estate, but against it. But that is not material. The principle is the same (**In re Becker Bros.**, 139 Fed. 366), and was applied by the Supreme Court of Tennessee in **Meredith v. National Bank,**

127 Tenn. 90, which was a suit brought to recover the penalty in question, and the Court held that the penalty could not be applied as a credit on the principal. This rule was cited by petitioner, but not referred to by the state court in deciding the case.

In **First National Bank v. Hunter**, 109 Tenn. 91, 70 S. W. 371, the State Supreme Court held, following **Haseltine v. Bank**, 183 U. S. 135, and other similar cases, that in an action by a national bank upon notes held by it a defendant cannot set off or recover by cross bill the amount of usury actually paid, even though the notes represent the unpaid remnants of a series of renewals upon which usury was paid. Undoubtedly the Court was correct in following the decisions of this Court, notwithstanding there was then in full force and effect the same state statute with respect to set-off under which the state court now holds that such relief is available.

In **Lebanon National Bank v. Karmany**, 98 Pa. 65, the defendant offered in evidence certain judgments recovered by it against the plaintiff, exceeding in amount the penalty claimed in the action. In holding that set-off is not permissible in an action for the penalty prescribed by the federal statute, the Court said (page 75):

> "The terms of the statute are too plain for different constructions. If illegal interest be contracted for, the debt shall bear no interest. If such interest be paid, the offending bank is liable in an action for twice the amount. That liability is incurred the moment the bank takes the illegal interest. The intendment is to prevent banks contracting or receiving more than lawful interest for the use of money. To permit a bank which had actually received illegal interest, when sued for the penalty, to chop round and call it a credit on the principal, would vitiate the vindicatory clause of

the statute. In such case the taking would amount to nothing more than a contracting to receive. The statute inflicts twice the penalty for taking that it does for contracting. **Monongahela Nat'l Bank v. Overhold,** 38 Leg. Intell. 185. In Pennsylvania the statute authorizes the debtor, at his option, to deduct the excess of interest from the debt, or to pay the whole debt and unlawful interest, and then recover back the excess over the lawful. **Such statutes and decisions under them throw no light on the question now pending."** (Emphasis ours.)

That the payment of the principal debt is not a condition precedent to a recovery of the penalty, and that it cannot be applied as a credit upon any balance owing the bank is further apparent from the case of **McCarthy v. First National Bank** (1912), 223 U. S. 493, 56 L. Ed. 523, where Mr. Justice Lamar pointed out that the statute not only furnishes a defense where illegal interest is charged, but gives a right of action where illegal interest is actually paid, which right of action arises immediately upon the interest being paid, without respect to the date of the loan, or the date of the satisfaction of the debt. The Court said:

"But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, **the right of the one and the liability of the other is fixed, the cause of action arises, and the Statute of Limitations begins to run.** There is no *locus penitentiae.* That privilege is only granted to those banks which, having charged usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the twofold penalty." (Emphasis ours.)

The right of the debtor to the penalty and the liability of the bank therefor being fixed at the date of the payment

of the usury, it must follow, we believe, that the defendant in the instant case, having violated the statute, cannot have all the advantage of a *locus penitentiae* by a decree that the fine or penalty provided for its illegal act shall be applied as a credit upon the debt of the bankrupt to it.

Finally, on this phase of the case, this is a **penal** or **tort** action, to recover the penalty provided for a wrong done the estate of the bankrupt.

> "A suit against a national bank to recover back twice the amount of interest illegally paid **is a suit to recover a penalty** under a law of the United States." (Emphasis ours.)
>
> Chicago Nat'l Bank v. Morgan, 132 U. S. 141, 33 L. Ed. 282.

The statute, strictly and primarily, is designed to impose **punishment** for an offense against the people of the United States. **Huntington v. Attrill**, 146 U. S. 657, 36 L. Ed. 1123.

In the present case the bank has confessedly charged and collected illegal interest. It has violated the law and is liable for the penalty. If it be held that a bank, when sued for the penalty, may plead as a justification that a debt was due it by the bankrupt in bar of the action, the violator of the statute would escape merited punishment, and would feel free to take illegal interest at will, in defiance of law.

Lebanon Nat'l Bank v. Karmany, 98 Pa. 65.

The rule established by this Court, that in an action for the penalty no other question can be litigated except the

question of whether the illegal interest was received, is the rule in all penal actions.

> Morehouse v. McRae, 30 Hun. 628 (reversed on ground of accord and satisfaction, 98 N. Y. 552).

The equitable defense of set-off is not available in the instant case, because it has no place in the procedural conditions contained in the statute itself.

> Lowden v. Northwestern Nat'l Bank & Tr. Company, 298 U. S. 164, 80 L. Ed. 114.

(2) Controversy as to Set-Off Controlled by the Bankruptcy Act.

It is believed defendant's claim to right of set-off is concluded by what has been said hereinabove, and particularly the fact that the doctrine of set-off has no place in the procedural conditions provided by the statute (**Lowden v. Northwestern N. Bank**, 298 U. S. 164, 80 L. Ed. 114, 56 S. Ct. 696). However, if the Court should come to a consideration of the question whether defendant is entitled to the defense of set-off, petitioner contends that he sues as trustee in bankruptcy, and for this reason the controversy is controlled, *ex proprio vigore,* by Section 68 (a) of the Bankruptcy Act, 11 U. S. C. A., Section 108-a), which provides:

> "In all cases of **mutual debts or mutual credits** between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." (Emphasis ours.)

In the words of Mr. Justice Cardozo, this precept was

"framed on the example of ancient laws from across the seas," and "is applicable by force of statute to the liquidation of estates in bankruptcy." The rule in bankruptcy is "framed in adaption to standarized conditions, and the more flexible rule enforced in such cases by courts of equity is not to be substituted therefor. **Lowden v. Northwestern N. Bank**, 298 U. S. 164, 80 L. Ed. 114, 56 S. Ct. 696.

From the wording of the foregoing subsection of the statute it is evident that before a creditor may enjoy the use of the set-off principle against the bankrupt's estate, two essential elements must be established:

(a) Two debts must exist, one of the creditor and one of the bankrupt's estate.

(b) These debts must be mutual, i. e., the creditor's debt must be owing to the estate of the bankrupt, and the estate's debt must be owing to the creditor.

When these essentials are fulfilled the statute applies with full force and may be taken advantage of. If the two elements do not exist, there is no right of set-off.

McDaniel Nat. Bank v. Bridwell (8 C. C. A.), 74 F. (2d) 331.

Petitioner contends (a) there are not two debts in the instant case, the claim for the penalty not being a debt within the meaning of the statute, and (b) the debt of the bankrupt to the bank and the liability of the bank for the penalty are not due in the same capacity or right, and there is not mutuality as to the quality of the right.

(a) **Claim of petitioner for penalty not a debt.**

That the term "mutual debts and credits" does not include a claim for a penalty such as that here sought to be

enforced appears from Section 1 (11) of the Bankruptcy Act (11 U. S. C. A., Section 1), which provides that the word "debt" shall include any debt, demand or claim provable in bankruptcy.

Under Section 57 (j) of the Bankruptcy Act a claim for a penalty of this character is not provable against a bankrupt, and this Court has repeatedly held that statutory penalties and common-law liabilities of this kind, not predicated on contract, are nondischargeable and nonprovable in bankruptcy.

> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084;
> Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390.

The Bankruptcy Act of 1867 had a provision substantially similar to section 68 (a) of the present act, which was itself taken from the earlier English acts, under which it was decided that "mutual credits" are meant such as must, in their nature, terminate in **debts**, or a debt be in the contemplation of the parties. **Libby v. Hopkins**, 104 U. S. 303, 26 L. Ed. 769. It was accordingly held in this case that in a suit by an assignee in bankruptcy to recover money sent to defendant by the bankrupt to be applied to a specific purpose constituted a trust and not a debt, and that the same could not be applied as a set-off upon a debt owing by the bankrupt to defendant. It was said:

> "In our act the terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of the section or its context for extending the term 'credits' so as to include trusts. Generally, we know that 'credit' and 'trust' are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they

should be confounded in interpreting the twentieth section of the Bankrupt Act.

"To authorize a set-off there must be mutual credits or mutual debts."

It seems, likewise, that "debt" and "penalty" are not synonymous terms; they have distinct and well-settled meanings, and should not be confounded in interpreting Section 68 of our Bankruptcy Act.

The charging and taking of illegal interest did not make the bank the debtor of the bankrupt, but its tort-feasor, so there were in the case no mutual debts or credits. The indebtedness was all on the side of the Lookout Planing Mills. The bank owed it nothing. The liability for the penalty was not created for the purpose of being applied in satisfaction of the debt; neither of the parties had any such purpose at the time the debt was created. To hold that the penalty shall be so applied without the consent of the party entitled to recover the penalty would produce a result not contemplated by Congress or the parties, and would permit a national bank to violate the mandate of the statute almost at will.

Libby v. Hopkins, supra;
McDaniel Nat'l Bank v. Bridwell (8 C. C. A.), 74 F. (2d) 331.

The suit of petitioner is a **penal** action.

"The remedy given for the wrong is a **penal suit.**"
Barnet v. Muncie National Bank (1878), 98 U. S. 555, 25 L. Ed. 212.

It is "a suit to recover a penalty under a law of the United States."

Chicago N. Bank v. Morgan, 132 U. S. 141, 33 L. Ed. 282.

The right of action given by this statute is not a recovery of the money paid by the bankrupt, but it is an action to recover a penalty, and the fact that the amount of the penalty is fixed by the amount of the interest paid does not change the fact that the recovery is a penalty. **Sugg v. Smith** (Texas Court of Appeals), 205 S. W. 363, 373.

While the action is in *form ex contractu,* it is founded in fact upon a tort.

Chaffee v. United States, 18 Wall. 516, 21 L. Ed. 908.

"Ordinarily the term 'debt' does not include the obligation arising on account of a tort committed."

17 C. J., page 1378.

In **Wilson v. National Bank of Rolla** (C. C.), 3 Fed. 391, the Court said, construing the Statute of 1867, of a penalty imposed by a statute against usury, page 393:

"It is very clear that a penalty for violation of a penal statute is not a debt within the terms of the law, and that is all the claim there was in favor of the bankrupt at the time of the adjudication in bankruptcy."

Essential Nature of Cause of Action Not Changed by Rendition of Judgment.

Counsel for defendant bank say, on page 13 of their brief:

"The penalty was reduced to judgment in this suit * * * the judgment became, even if the right of action had not before been, * * * subject to set-off against the claim of defendant Bank."

This Court has refused to follow the rule contended for by defendant. On the contrary, it has repeatedly held that the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it. Thus, in **Wisconsin v. Pelican Insurance Company**, 127 U. S. 265, 32 L. Ed. 239, it is said:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it."

In **Boynton v. Ball**, 121 U. S. 457, 466, 31 L. Ed. 985, 986, it is said:

> "But this Court * * * is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been * * * it still remains the same debt on which the action was brought," etc.

In **Wetmore v. Markoe**, 196 U. S. 68, 49 L. Ed. 390, opinion by Mr. Justice Day, in holding that a final decree for alimony was not a "debt" within the meaning of the Bankruptcy Act, and dischargeable as such, the Court said:

> "The mere fact that a judgment has been rendered does not prevent the Court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment."

It was further said in this **Wetmore v. Markoe** case that while the obligation had become fixed by an unalterable decree so far as the amount to be contributed by the husband was concerned, the Court would look beneath the

judgment for the foundation upon which it rested; that the judgment "was only a means designed by the Court for carrying into effect and making available to the wife and children a right which the law gives them as against the husband and father."

Looking beneath the judgment for the foundation upon which the judgment for petitioner rests, it is readily apparent, we believe, that it was not decreed for any debt of the bank to the bankrupt, but was only a means designed by the law for carrying into effect the intent of Congress to punish a violator of the usury statute, and to make available to the bankrupt and its creditors the right which the law gives them against such violator.

Counsel for defendant apparently concede that the claim or liability for the penalty was not subject to set-off against the debt of the bankrupt to defendant. No suit for this penalty had been instituted at the time of the adjudication in bankruptcy, and it is therefore contended by petitioner that the right to set-off did not become available to defendant upon reduction of the claim for the penalty to judgment.

> "The right to set-off is governed by the state of things existing at the moment of insolvency, not by conditions thereafter arising, * * * or by any subsequent action taken by either party to the transaction."
>
> Davis v. Elmira Savings Bank, 161 U. S. 275, 290, 40 L. Ed. 700;
> Yardley v. Philler, 167 U. S. 344, 360, 42 L. Ed. 192;
> Dakin v. Bayley, 290 U. S. 143, 148, 78 L. Ed. 229.

(b) **No mutuality of debt or credit.**

Petitioner contends that the State Supreme Court, in allowing defendant to apply the judgment or penalty against the debt of the bankrupt to the defendant, ignored the substantive requirement that the demands shall be mutual in quality.

> "To authorize a set-off there must be mutual credits or mutual debts."
>
> Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769.

> "To be mutual debts between the parties must be owing to and be due in the same rights and capacities.".
>
> Collier on Bankruptcy (13th Ed.), p. 1607.

As stated by this Court in **Dakin v. Bayly**, 290 U. S. 143, 146, 78 L. Ed. 229, 232, the question for determination is:

> "Were the cross demands of the parties of the same quality, or, to state it otherwise, did each claim from the other in the same right?"

That there is no mutuality of right is apparent, we believe, from the fact that under repeated holdings of this Court, beginning with **Barnet v. Muncie Nat'l Bank**, supra, this Court has held that the borrower, when sued by a national bank, cannot have usurious interest paid applied as a credit upon or set-off against the principal indebtedness.

> "Set-off can be allowed only in actions founded upon demands which could themselves be the subject of set-off."
>
> 57 C. J. 379.

> "The cardinal principle in the rule of equitable set-off is mutuality of claims, **and the right of the parties**

seeking the set-offs to maintain an action to recover the fund sought to be set off." (Emphasis ours.)

Helms v. Citizens Bank of Erwin (Tenn. Ct. of Appeals), 97 S. W. (2d) 665.

Counsel for defendant argue, on page 6 of their brief, that the claims are mutual, because the penalty sued for grows out of the bankrupt's indebtedness to the bank. Thus it is said:

"The bank's claim is a provable debt, and **the penalty sued for having grown out of the bankrupt's indebtedness to the bank**, the claims are mutual." (Emphasis ours.)

And, again:

"The excess interest in this case was taken upon the indebtedness of the bankrupt to the bank, and manifestly the claims are mutual and **grew out of the same transaction.**" (Emphasis ours.)

Counsel for defendant cite no authority to support this proposition.

No holding has been found to the effect that, under Section 68 of the Bankruptcy Act, a claim in contract may be set off against a tort claim asserted by a trustee in bankruptcy. The contrary is held in the comparatively recent case of **Irving Trust Co. v. Altman** (City Ct. of N. Y., 1933), 276 N. Y. S. 781.

In an action by a trustee in bankruptcy to recover money paid as commissions under a contract invalid under the New York penal law, the defendant cannot set off an indebtedness growing out of a deficiency judgment against the bankrupt, because such indebtedness is not in the same

right and does not fall within the provisions of Section 68 of the Bankruptcy Act.

Palmer v. Doull Miller Co. (D. C. N. Y.), 233 Fed. 309.

The liability of a director of a corporation for excess indebtedness falls within the same reasoning that applies to an unpaid stock subscription, and is a trust fund for the benefit of all the creditors, ratably.

In re La Jolla Lumber & Mill Co. (D. C.), 243 Fed. 1004.

A stockholder is not entitled to set off his claim upon a corporation against his indebtedness for an unpaid subscription to its capital stock, and this principle controls the instant case.

Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731;
Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 168.

Money fraudulently received by a stockholder to retire his stock may not be set off against amounts paid by him after bankruptcy because of his guaranty of corporate notes.

Lytle v. Andrews (8 C. C. A.), 34 Fed. (2d) 252.

There was never any mutuality of debts between the bank and the trustee, nor, for that matter, between the bank and the bankrupt. The trustee never owed the bank anything. It would have been no different had the trustee deposited funds of the estate with the bank. There would then have been no right of set-off. The bankrupt had no right to set off the penalty against the indebtedness to the bank; and the bank had no right to apply the penalty as a

credit upon the bankrupt's indebtedness to it. It did not undertake to do so until judgment was rendered against it in favor of the trustee. Mutuality of debt and credit at the time of the filing of the petition, or at any other time, was lacking.

CONCLUSION.

It is therefore respectfully submitted that the decree of the Supreme Court of the State of Tennessee, entered June 4, 1937, upon opinion filed May 24, 1937, in the case of **C. C. McCollum, Trustee, v. Hamilton National Bank of Chattanooga,** should be modified and reversed by this Honorable Court in so far as it provides that the amount of the indebtedness of the bankrupt to defendant shall be applied as a set-off against or payment of the decree in favor of petitioner.

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